Constitutional Dimensions of the Proposal to Eliminate the Exemption for "Philosophical Objection" from Vermont's Mandatory School Vaccination Requirement

Testimony of Peter R. Teachout
Professor of Law, Vermont Law School
May 6, 2015

I. Introduction

My name is Peter Teachout. I am a professor of law at Vermont Law School, where I have been a member of the faculty since 1975. My fields of interest and scholarship include American constitutional law and Vermont constitutional law and history. I have done research and published articles on subjects in both of those fields. I appreciate the opportunity to be able to testify before the House Health Care Committee today.

I have been asked to testify whether the bill under consideration, H.98, which would eliminate the exemption for philosophical objection under the state's mandatory vaccination law, would be open to constitutional challenge. The short answer is that a challenge to a legislative decision to remove of the philosophical objection based on either federal or state constitutional grounds would be unlikely to succeed.

I recognize that some of the constitutional ground I cover in my prepared written statement may have already been covered by other witnesses before the Committee, so in my oral testimony today I would like to depart somewhat from my written statement, skipping over some of the more detailed constitutional analysis, but I am available to answer questions about that material if there are questions.

In my testimony today, I would instead like to make three basic points: First, I would like to explain why the proposed legislation raises important constitutional concerns notwithstanding the fact that the courts would likely find the legislation to be constitutional. Second, I would like to explain briefly my basis for concluding that the proposed measure, if adopted and subsequently challenged in court, would survive constitutional challenge. And third, notwithstanding my prediction of likely outcome in the courts, I would like to explain why I think the state legislature, before it acts to remove the exemption, has a responsibility to consider carefully the implications and possible consequences of doing so and to explore possible alternatives that might largely achieve the same desired end with less adverse impact and dislocation for affected families.

II. Why a "Constitutional" Issue?

The bill under consideration, if adopted, would eliminate from the state's mandatory vaccination requirement for children attending public and independent schools the currently existing exemption based on "philosophical objection." It is important to understand why this proposal raises constitutional issues, and what sort of constitutional values are implicated, not so much in a narrow technical sense but rather from the larger perspective of the important constitutional and cultural values that our federal and state constitutions seek to protect from state interference.

In this situation, as it turns out, not one, but four distinct constitutional rights are potentially threatened by the proposed legislation and they all converge in the expression of parental objection to the requirement that their children submit to mandatory vaccination as a precondition to being allowed to enroll in school: (1) the right of parents to control the upbringing of their own children; (2) the right to be free from state actions that involve violations of bodily integrity; (3) the right to education, especially in light of how important education is in the modem world; and (4) the right to follow the dictates of one's conscience with respect to matters as personal as this (the right of "conscientious objection"). These rights have all been recognized to one extent or another by the courts, always, however, it is important to stress, with recognition that such rights and liberties are not absolute and their exercise is therefore subject to reasonable government regulation adopted in the name of protecting the safety, health, and welfare of the general public. Still the values these "rights" represent are important and deserve to be respected whether or not, in this particular context, they would be entitled to formal constitutional protection by the courts.

Having said that, I need to tell you as a practical matter what I think the courts would do if Vermont were to decide to eliminate the philosophical objection and if that decision were to be challenged in court on grounds that it violates the constitutional rights of adversely affected parents and children. I can put it simply and directly: it is highly unlikely that the courts would strike the legislation down on constitutional grounds.

III. Constitutional Challenges

There two types of constitutional challenges that could be brought: (1) challenges based on the claim the law violates rights protected under the federal constitution and (2) challenges based on the claim the law violates rights protected under the Vermont state constitution. Let me address each of these in turn.

A. Federal constitutional challenges

Constitutional challenges to mandatory vaccine requirements go back more than a century. The seminal, and still leading, case in this area is the 1905 Supreme Court decision in *Jacobson v. Massachusetts*, 197 U.S. 11, 23 S.Ct. 358 (1905). In that case, discussed in more detail below, the Court upheld a Cambridge, Massachusetts, ordinance requiring mandatory vaccination of all adults in the community, rejecting in doing so the argument that the mandatory requirement violated the defendant's right to liberty. Since that decision, federal and state courts have dealt with a variety of constitutional challenges to mandatory vaccine requirements, generating a substantial body of jurisprudence which for the most part follows the basic outline established by the *Jacobson* case. The constitutional jurisprudence that emerges from these decisions solidly supports, I believe, the two following propositions:

(1) A state may impose mandatory vaccine requirements generally, *Jacobson v. Massachusetts, supra,* and also as a requirement for attendance at public schools, *Zucht v. King*, 260 U.S. 174, 43 S.Ct. 24 (1922), without violating federal constitutional rights provided such requirements are aimed at protecting public health and welfare and are not arbitrary or unreasonable.

Absent clear abuse, determinations of reasonableness are matters for legislative judgment. *Jacobson v. Massachusetts, supra; Phillips v. City of New York,* 775 F.3rd 358 (2nd Cir. 2015)(see Appendix A)

(2) A state imposing a mandatory vaccine requirement as a condition for attendance at public schools may provide for exemptions based on religious or philosophical objection, but it is not constitutionally required to provide either exemption. *See Phillips v. City of New York, supra; Workman v. Mingo County Bd. Of Educ., 419 Fed.Appx 348* (4th Cir. 2011)*; see also Prince v. Massachusetts, 321 U.S. 158, 64 Sp.Ct. 438* (1944).

In deciding these cases, the courts have recognized that mandatory vaccine requirements interfere with individual liberty but in the end they have found that the liberty is not absolute and that its exercise necessarily must be subject to reasonable government regulations aimed at protecting public health, safety, and welfare ("police power" regulations).

As noted above, the seminal U.S. Supreme Court case in this area is *Jacobson v. Massachusetts* (1905). In that case the defendant refused to comply with a Cambridge, Massachusetts, ordinance, adopted in the context of a smallpox epidemic, requiring adult vaccination for smallpox with a penalty for refusal of a $5 fine. The Court upheld the mandatory vaccine requirement against the defendant's claim that it violated his rights to liberty under the federal constitution. The following passage illustrates how the Court sought to reconcile the conflict between the claim of individual liberty on the one hand and the government's responsibility to protect the health and safety of the public on the other:

> "The defendant insists that his liberty is invaded when the state subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory vaccination law is unreasonable, arbitrary, and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person. But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state…'"
>
> *Jacobson v. Massachusetts,* 25 S.Ct. 358, 361 (1905)

Subsequent federal and state court decisions upholding mandatory vaccination requirements over the intervening years follow basically the same analysis.

It is true that *Jacobson* did not involve a mandatory vaccine requirement for attendance at public schools. The vaccine requirement in that case applied only to adults and it had nothing to do with school attendance. But in 1922, relying on the *Jacobson* analysis, the Supreme Court in *Zucht v. King*, 260 U.S. 174, 43 S.Ct. 24 (1992) upheld a state law requiring mandatory vaccine for children as a condition for enrollment in public schools.

Over the intervening years, these two U.S. Supreme Court decisions have been repeatedly relied upon by both state and federal courts in upholding mandatory school vaccination requirements against constitutional challenges based on the claim that such requirements violate the constitutional rights and liberties of parents and children.

The most recent installment in this development is the Second Circuit Federal Court of Appeals' decision in *Phillips v. New York* (January, 2015), see Appendix A, upholding New York's mandatory school vaccination requirement. New York law provides an exemption based on religious objection but does not provide an exemption based on philosophical objection. In that respect, New York law pretty much reflects the approach that Vermont law would adopt if it were to eliminate the philosophical exemption. The *Phillips* decision is particularly relevant since if Vermont were to eliminate the philosophical exemption, and if that decision were to be challenged on federal constitutional grounds, the Second Circuit would be the court that would hear the case on appeal.

Significantly, the *Phillips* court thought the question was so well-settled, so beyond reasonable debate at this point in time, that it issued its decision in the form of a summary *per curiam* opinion. I reproduce the Court's spare but straight-to-the-point discussion of the core constitutional issues in its entirety in Appendix A, *infra*, since it is highly likely that a federal constitutional challenge to a Vermont legislative decision eliminating the philosophical exemption would be analyzed and decided in the same way. If you want to know how a court would likely decide a federal constitutional challenge to an amended Vermont law eliminating the philosophical exemption, the *Phillips* is a good indication.

That leaves the question, of course, of whether a state decision to eliminate the exemption based on <u>religious objection</u> would fare differently in federal court. Since that is not under consideration here, I need not spend any further time on it, other than to say the jurisprudence here is pretty clear as well. If the state were to eliminate the religious objection exemption, a challenge based on a claimed violation of the free exercise rights of individuals would fare no better in the federal courts. See the discussion in the second and third paragraphs of the *Phillips* case, set out in Appendix A below.

In summary, a federal constitutional challenge to a decision by the Vermont legislature to eliminate the philosophical objection is unlikely to succeed.

B. <u>State constitutional challenges</u>

The analysis of possible challenges based on rights protected by the Vermont state constitution, as opposed to the federal constitution, is a little different but the end result is likely to be the same.

There are two possible bases for challenging a legislative decision to eliminate the exemption based on philosophical objection on grounds that it violates rights protected by the Vermont constitution: (1) that it violates a "right to education" protected by the Vermont constitution; and (2) that it violates the so-called "Common Benefits" clause. For the reasons set out below, it is safe to predict that neither of these challenges would be likely to succeed.

1. "'Right to education''?

The first question is whether the Vermont constitution establishes a "right to education.'' The state constitution itself makes no reference to a "right to education." The only provision in the Vermont state constitution that has any bearing on the question, the so-called "education clause," is Section 68 of Chapter III which reads as follows:

> "Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force, and duly executed; and a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth…"
>
> Vermont Constitution, Ch. II, Sec. 68

As you can see, this provision does not talk about a "'constitutional right to education" but rather imposes a constitutional duty on the state to maintain a "competent number of [public] schools" for children seeking the benefits of public school education. When the court in the *Brigham* case refers to a "right to education" it was doing so in the context of the question before it - whether the state has a constitutional duty to provide public school students in the state with "substantially equal educational opportunity" - and the court determined that the school funding system then in place failed to meet that duty since students in property poor communities were being deprived of the kinds of educational opportunities that students in property rich communities enjoyed. The court in *Brigham* did not, and did not purport to, establish a free-standing "right to education" under the Vermont constitution.

I should add that, even if the Vermont constitution did establish a constitutional "right to education," that would not preclude the state from imposing attendance requirements - such as the vaccine requirement under consideration here – aimed at protecting the health and safety of students and staff. To the extent such a "right" exists, in other words, it is at most a conditional right: a right to attend public schools (and to receive "substantially equal educational opportunity" in those schools) so long as those claiming the right comply with basic school requirements.

Having said that, however, it is important to recognize that in the *Brigham* case, the court did stress the importance attached by the framers of the Vermont constitution to providing Vermont children educational opportunity through the establishment of a system of

public schools and the importance of education in modern life as a foundation for the responsible exercise of civic responsibilities. So, however the courts might rule in this area, that does not dispose of the constitutional question as far as the legislature is concerned. Were the legislature to make a decision that would effectively cut off access to meaningful educational opportunity for many of Vermont's children, it would be a decision of "constitutional importance" no matter what the courts might do. It is something therefore that the legislature ought to take into careful consideration before making such a decision.

2. The "Common Benefits" Clause

If Vermont were to eliminate the exemption for "philosophical objection," parents might also challenge that decision on grounds that it violates their rights to equal protection under the so-called "'Common Benefits Clause" of the Vermont constitution[1] based on the argument that their children would no longer be able to attend public schools on the same terms as other children. The Common Benefits Clause is found in Article 7 of Chapter I:

> "That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family or set of persons who are a part only of that community…"

The problem with reliance on this provision by parents seeking an exemption from a generally applicable school attendance requirement aimed at protecting the health, safety, and welfare of the general population of students is that the basic thrust of the Common Benefits Clause cuts in exactly the opposite direction. The Common Benefit clause calls upon government to adopt laws that benefit the entire "community" and, conversely, to avoid adopting laws that favor a particular sub-group within that community – especially when doing so would arguably be at the expense of the "general welfare." In short, this provision actually cuts against protecting the interests of the "philosophical objection" minority in the school population to the extent those interests might be seen to conflict with the interests of the general school population.

Given this fundamental problem with reliance on the Common Benefits clause, I am not sure it makes sense to spend time discussing the particular test the Court would apply if a challenge were brought under that clause and how it would apply to the arguments made by adversely affected parents and children. I think, however, that most observers would agree that, whatever the test, and however applied, it is extremely unlikely that the Vermont court would invoke this clause as a basis for striking down a legislative decision to eliminate the philosophical objection exemption and for requiring, as a matter of state constitutional law, that unvaccinated students be admitted or re-admitted to Vermont's public schools.

C. Summary

[1] The Vermont constitution has no equal protection clause so the court has come to rely instead on the Common Benefits clause to do the work that the Equal Protection clause does in the U.S. Constitution.

Based on review of the cases and related constitutional texts discussed above, and on other cases not discussed here because of space limitations, the following conclusions seem warranted:

(1) The state may eliminate both the philosophical and religious exemptions without violating either the federal or state constitutions.

(2) The state may eliminate the philosophical objection exemption but maintain the religious objection without violating either the federal or state constitutions.

(3) The state may maintain both the religious and philosophical objection exemptions without violating the federal or state constitutions.

In sum, the state has considerable latitude – from a purely constitutional standpoint - in deciding what policy it wants to adopt regarding the vaccination requirement for children in public and independent schools.

IV. Special legislative considerations: potential impacts and alternatives

Understanding what the courts are likely to do if faced with a constitutional challenge is important. But as far as the legislature is concerned, it is not the end of the matter. The legislature also has a responsibility to take into account constitutional values in making legislative decisions. In this respect, I would like to make three additional points, all of which point in the direction of urging the legislature to consider carefully the possible impacts of eliminating the philosophical objection and to explore available alternatives before taking precipitous action.

First, it is important to recognize that imposing a vaccine requirement without providing for exemptions for philosophical objection could impose an acute hardship on families who for conscientious reasons are opposed to some or all types of vaccination for their children. It puts them in an untenable bind: either they have to allow vaccination, and in doing so betray their deeply held conscientious objections, or pull their kids out of school. That is an uncharacteristic choice to force upon a state's citizens and it should be done only reluctantly and after full consideration of possible alternatives. Effectively, it leaves such families with only one option: home schooling. If both parents work and there are no neighbors available to share home schooling responsibilities (assuming that sharing would be allowed), that option may turn out to be illusory. It is not hard to see why, even in the face of the recent measles outbreak, there is reluctance to force on families who object to vaccinations for their children that awful choice. It is also easy to see why this proposal has generated such strong resistance.

Second, if the legislature were to decide to eliminate the philosophical objection, the reality is some of the families who currently rely on that as a basis for claiming exemption may turn to the religious objection as an alternative. It is quite likely the state will witness a precipitation of requests in that direction. That in turn would give rise to a number of questions

that I am not sure the legislature has, at least at this point, adequately thought through.

(1) For example, what should constitute a legitimate "religious objection" under Vermont law? Should the "religious objection" be available only to those who belong to those organized religions which hold as a central tenet objection to vaccination? Should it be any objection based on sincere and deeply held religious or spiritual beliefs? Some states have adopted an even broader definition: Oregon law, for example, defines a "religious objection" as any objection based on "a system of beliefs." The Vermont legislature is free to define what qualifies as "religious objection" for purposes of this law, but it ought to do so before, rather than after, pulling the philosophical objection out from under those who wish to seek exemption.

(2) What process, if any, should the state establish to determine whether a particular assertion of "religious objection" is valid or legitimate? Should it be left to self-determination by the individual parent invoking the exemption? Or should the state establish some process for reviewing and rejecting claims asserted under this exemption? This is very tricky territory from a constitutional standpoint because of a long-standing view that the state should not get into the business of determining which religious views are legitimate and which are not and it has given rise to a number of constitutional challenges.

In short, there are important questions regarding availability and enforcement of the religious exemption that need to be addressed before deciding to eliminate the philosophical exemption. Simply to eliminate the philosophical exemption and then wait to see how things sugar out with the religious exemption, it seems to me, is not a responsible course of action.

Third, before making a decision that potentially could have such a profound impact on many Vermont families (and, not unimportantly, generate a great deal of resentment and distrust), one has to ask if the state has adequately explored alternative ways of reducing the number of families who currently invoke the philosophical objection. At the very least, the legislature has an obligation to consider whether a more effective process for ensuring "informed refusal" might lead to significant reductions in those claiming an exemption before taking such a drastic step.

There is in this respect some intriguing new evidence emerging from Oregon's experience this past year with a new "educational module." The available evidence indicates that dramatic reductions in the numbers of families claiming exemptions might be achieved by establishing and implementing a more effective educational requirement.

Under current Vermont law, in order to claim an exemption, essentially all one has to do is check off a few boxes and sign a statement saying one has read and understands the educational material supplied by the state. Oregon, in contrast, has developed a web-accessible educational module which takes anywhere from a half-hour to an hour to complete. Anyone claiming an exemption under Oregon law has to complete the module before being allowed to apply for an exemption. In the first year of operation, the adoption of this "educational module" approach in Oregon has significantly reduced the number of families claiming exemption for non-medical reasons. The percentage of kindergarteners claiming the exemption this year dropped by 7% over last year (some 600 fewer families applied for the

exemption). That is a not insignificant drop. The Oregon experience suggests that Vermont might be able to reduce significantly the number of families invoking the philosophical objection simply by adopting a more robust educational requirement based on the Oregon model. Given the high stakes involved, and the deeply felt convictions on both sides, it seems to me that this is something that the state should at least explore before taking out the sledgehammer and completely eliminating the philosophical exemption.

Finally, if, notwithstanding the various considerations that militate in favor of moving slowly in this area, there still is majority in sentiment in the legislature for eliminating the philosophical exemption, and deciding to do it this year, I hope some consideration might be given to phasing in the elimination, starting with students entering school for the first time next fall. Such an approach would have a much less disruptive impact on families with students currently enrolled in the schools. That gradual approach – phasing in the elimination of the philosophical exemption over a period of years - coupled with state authority to remove unvaccinated students from school if and when the threat of a possible epidemic actually materializes, should provide adequate safeguard and protection of competing interests during the intervening period while minimizing the hardship and dislocation for affected families.

Appendix A

Phillips v. City of New York, 775 F.3rd 538 (U.S. Ct. of Appeals, 2nd Circuit) (January, 2015)

[Plaintiffs challenged the constitutionality of a New York law requiring that students in the State's public schools be immunized against various vaccine-preventable illnesses. The New York statute provides two exemptions from the immunization mandate. First, a medical exemption is available "[i]f any physician licensed to practice medicine in this state certifies that such immunization may be detrimental to a child's health." *Id.* § 2164(8). Second, a religious exemption is available for "children whose parent, parents, or guardian hold genuine and sincere religious beliefs which are contrary to the practices herein required." *Id*. § 2164(9). The State provides multiple layers of review for parents if either of these exemptions is denied. The State does not allow exemptions based on philosophical objection. Plaintiffs challenged both the vaccination requirement and a state regulation allowing unvaccinated children to be excluded from public school based on outbreak of vaccine-preventable disease. The Second Circuit Federal Court of Appeals held, in a *per curiam* opinion, that:

1) New York's vaccination statute does not violate substantive due process [based on the argument that the law violates a constitutional right or interferes with a protected liberty];

2) New York's vaccination statute does not violate Free Exercise Clause.]

Excerpt from the Court's opinion:

"I. Substantive Due Process

"Plaintiffs argue that **New York's** mandatory vaccination requirement violates substantive due

process. This argument is foreclosed by the Supreme Court's decision in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11,25 S.Ct. 358, 49 L.Ed. 643 (1905). In that case, the plaintiff challenged Massachusetts's compulsory vaccination law under the Fout1eenth Amendment. The Supreme Court held that mandatory vaccination was within the State's police power. *Id.* at 25-27, 25 S.Ct. 358; *see Zucht v. King,* 260 U.S. 174, 176, 43 S.Ct. 24, 67 L.Ed. 194 (1922) *("Jacobson* ... settled that it is within the police power of a state to provide for compulsory vaccination."). The Court rejected the claim that the individual liberty guaranteed by the Constitution overcame the State's judgment that mandatory vaccination was in the interest of the population as a whole. *Jacobson,* 197 U.S. at 38, 25 S.Ct. 358. Plaintiffs argue that a growing body of scientific evidence demonstrates that vaccines cause more harm to society than good, but as *Jacobson* made clear, that is a determination for the legislature, not the individual objectors. *See id.* at 37-38, 25 S.Ct. 358. Plaintiffs' substantive due process challenge to the mandatory vaccination regime is therefore no more compelling than *Jacobson's* was more than a century ago. *See Caviezel v. Great Neck Pub. Schs,* 500 Fed.Appx. 16, 19 (2d Cir. 2012) (summary order) (rejecting substantive due process challenge to vaccination mandate based on *Jacobson).*

"II. ***Free Exercise of Religion***

"Plaintiffs next argue that the temporary exclusion from school of the [plaintiffs'] children during the chicken pox outbreak unconstitutionally burdens their free exercise of religion. *Jacobson* did not address the free exercise of religion because, at the time it was decided, the Free Exercise Clause of the First Amendment had not yet been held to bind the states. See *Cantwel*l *v. Connecticut,* 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). Therefore, *Jacobson* does not specifically control [plaintiffs'] free exercise claim. The Supreme Court has stated in persuasive dictum, however, that a parent "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." *Prince v. Massachusett*s, 321 U.S. 158, 166-67, 64 S.Ct. 438, 88 L.Ed. 645 (1944). That dictum is consonant with the Court's and own precedents holding that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialea*h, 508 U.S. 520, 531, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993); *accord, Leebaert v. Harrington,* 332 F.3d 134, 143-44 (2d Cir.2003) (holding that parental claims of free exercise of religion are governed by rational basis test). Accordingly, we agree with the Fourth Circuit, following the reasoning of *Jacobson* and *Prince,* that mandatory vaccination as a condition for admission to school does not violate the Free Exercise Clause. *See Workman v. Mingo County Bd. of Educ.,* 419 Fed.Appx. 348, 353-54 (4th Cir.2011) (unpublished).

"**New York** could constitutionally require that all children be vaccinated in order to attend public school. New York law goes beyond what the Constitution requires by allowing an exemption for parents with genuine and sincere religious beliefs. Because the State could bar [plaintiffs'] children from school altogether, *a fortiori,* the State's more limited exclusion during an outbreak of a vaccine-preventable disease is clearly constitutional."